## COUNTER-STATEMENT OF THE QUESTION

Whether the State should be permitted to impeach a defendant with a statement obtained in violation of the Sixth Amendment.

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## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendments V, VI and XIV:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
>
> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## COUNTER-STATEMENT OF THE CASE

Respondent Tyris Lemont Harvey was arraigned on charges contained in the criminal complaint on July 2, 1986. The complaint charged two counts of first degree criminal sexual conduct, which carries a penalty of any number of years up to life in prison. A $20,000.00 cash bond was set. Respondent, an indigent, was remanded to the Wayne County Jail where he remained incarcerated throughout the entire proceedings. An attorney was appointed by the court to represent respondent, and on July 10, 1986, respondent, with appointed counsel, waived his statutory right to a preliminary examination. He was bound over for trial. The personal service voucher filed by respondent's appointed attorney shows a single visit to the Wayne County Jail on July 14, 1986.

Although respondent's bond was later reduced to $20,000.00-10%, he remained in custody. Respondent waived his right to a jury trial. His non-jury trial commenced September 15, 1986.

The complainant testified that she knew respondent for three or four months before the alleged offense. (R35, 36)

She met him when a neighbor brought him to her home to borrow the pipe she uses to smoke crack cocaine. (R36, 37) The complainant smoked crack cocaine one or two times a week, but testified she did not use drugs on the day in question. (R32) The complainant testified she was sexually assaulted by respondent. (R26) She reported the incident to the police approximately two days later. (R28, 29)

Respondent testified that he went to the complainant's home about 9:00 p.m. (R97) They smoked cocaine and he later asked if she would exchange sexual favors for more cocaine. (R98, 99) He went with the complainant's sister to get more cocaine. (R99) The complainant did not provide the sexual favors, they argued, and fought. (R99, 100) Respondent denied any sexual act. (R108)

During cross-examination of the respondent, the prosecutor utilized a statement respondent made to the police on July 2, 1986 in an effort to impeach him. (R110, 112) Then the prosecutor utilized a statement apparently made by respondent to a police officer six days before trial. (R116-121) The trial record does not indicate that respondent signed a constitutional rights waiver form at the time of the second statement nor does it indicate that respondent initialed any rights on such a form. The trial prosecutor conceded a *Miranda* violation, admitting that the statement was *Miranda* deficient. (R116)

No testimony was offered concerning any of the circumstances surrounding the taking of the statement. Instead, the trial record only contains the following remarks by the trial prosecutor:

> MS. HICKEY: Why? Your honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.

> I talked to the woman that took the statement and my indication is that Defendant indicated that he wanted to give a statement but he didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.
>
> That's why I did not choose to use it in my case in chief. There is no indication that it was involuntary and under *Harris* v. *New York*, I may, therefore, use it to impeach, even if improper Miranda is existing in this case. (R116, 117)

The only impeachment concerned the dollar amount of cocaine ($30, $50 or $80) (R116-119), whether respondent remembered the name of another man who had also gone to buy cocaine, and respondent's alleged omission in the September 9, 1986 statement that the other man had purchased his own cocaine. (R119-121)

## SUMMARY OF ARGUMENT

The record in this case does not affirmatively demonstrate that respondent's statement obtained in violation of the Sixth Amendment was voluntary. The issue of voluntariness was never adequately addressed or litigated below. It is unclear whether or not respondent's desire to invoke his Michigan statutory right to a polygraph examination was confused with any intention to speak with police officers conducting an interrogation six days before his trial.

The impeachment exception to the Fourth Amendment exclusionary rule should have no application to a deliberate violation of respondent's Sixth Amendment right to counsel. The Fourth Amendment and Sixth Amendment have distinct underlying purposes. Any analogy between the Fourth and Sixth Amendments is imperfect.

Sixth Amendment rights attach after formal charge and a violation of those rights impacts upon the integrity of the trial process. The "prosecutor and police have an affirmative obligation not to act in a manner that circumvents and, thereby, dilutes the protection afforded by the right to counsel." *Maine* v. *Moulton*, 474 US 159, 171 (1985). Where police interrogate a criminal defendant six days before his trial, the presence of counsel is necessary not only to advise the defendant on whether to make a statement, but also to mitigate dangers of untrustworthiness, to guarantee defendant comprehends questions propounded and ensure that his statement is fully accurate and "rightly reported by the prosecution at trial." *Miranda* v. *Arizona*, 384 US 436, 469-470 (1966).

Nor should the impeachment exception to the *Miranda* prophylactic rule, established in *Harris* v. *New York*, 401 US 222 (1970), have application to a deliberate violation of respondent's Sixth Amendment right to counsel. Where core values of either the Fifth Amendment or Sixth Amendment are implicated, then a balancing of those constitutional interests which must be protected and the truth seeking function of trial is impermissible. Petitioner's restrictive view of the role of counsel is contradicted by more than five decades of Sixth Amendment jurisprudence. Where the state deliberately violates the right to counsel, the need to preserve the right itself should render balancing impermissible.

Respondent commends a reading of *Michigan* v. *Jackson*, 475 US 625 (1986) as an application of the Sixth Amendment guarantee rather than as formulation of a prophylactic rule analogous to *Miranda* warnings. Assuming arguendo, however, that *Jackson* only establishes a prophylactic rule (a violation of which petitioner admits) the record in this case reflects a constitutional

deprivation which extends to the integrity of the trial process itself. The state should not be entitled to benefit in any fashion from wrongdoing which may impinge upon the integrity and reliability of the trial process. Any ruling otherwise would abrogate the constitutional guarantee of counsel so "essential to any fair trial of a case against a prisoner." *Powell* v. *Alabama*, 287 US 45, 70 (1932).

## ARGUMENT

### THE STATE SHOULD NOT BE PERMITTED TO IMPEACH A DEFENDANT WITH A STATEMENT OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT.

#### A. THE RECORD IN THIS CASE DOES NOT AFFIRMATIVELY DEMONSTRATE THAT RESPONDENT'S STATEMENT OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT WAS VOLUNTARY.

Respondent, a nineteen year old indigent with no prior record[1] was confined in a county jail throughout the entire criminal case. A mere six (6) days before his trial he was interrogated by police officers.[2] The record does not reveal when respondent's appointed counsel learned of the pretrial interrogation or was shown the purported statement. Indeed, the police officers' deliberate and misleading comment to respondent that he didn't need his attorney may have resulted in respondent's failure to inform counsel about the interrogation because the officer also told Mr. Harvey that his lawyer was going to get a copy of the statement. (R116, 117).

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[1] R. Sentence Hearing 3.

[2] Unlike *Harris* v. *New York*, 401 US 222 (1970), the statement itself was not placed in the record.

The trial prosecutor, during cross-examination of respondent, attempted to utilize the statement, as well as an alleged omission during the interrogation, for impeachment purposes. No testimonial record was made concerning the totality of circumstances revolving around the interrogation. Instead, there is only the characterization of the prosecutor:

> MS. HICKEY: Why? Your honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.
>
> I talked to the woman that took the statement and my indication is that Defendant indicated that he wanted to give a statement but he didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.
>
> That's why I did not choose to use it in my case in chief. And, I did advise counsel of that. There is no indication that it was involuntary and under *Harris* v. *New York*, I may, therefore, use it to impeach, even if improper Miranda is existing in this case. (R116, 117)

To be sure, the prosecutor's remarks concede no adequate *Miranda* warnings were given.[3] Those same remarks also demonstrate that the statement was taken in contravention of respondent's Sixth Amendment right to counsel.[4] Indeed, petitioner sought and gained access to this Court conceding a Sixth Amendment violation.[5]

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[3] This concession is in conflict with the opinion of the Michigan Court of Appeals. Brief for Petitioner 10 through 12.

[4] It is also evident that there was a violation of the prophylactic rule articulated in *Edwards* v. *Arizona*, 451 US 477 (1981).

[5] See Statement of Question Presented Petition p. 1. Now, in an extended discussion of the Sixth Amendment, petitioner backs away from this concession and extends an implied invitation to find no Sixth Amendment deprivation here or to reverse more than five decades of Sixth Amendment jurisprudence.

The trial prosecutor also reiterated an alleged statement by the police officer that "Defendant indicated he wanted to give a statement". This remark, along with respondent's affirmative response to a prosecutor's question incorporating respondent's belief in his own innocence, presumably, according to petitioner, demonstrates voluntariness. Respondent suggests that, given an essentially silent trial record, this is likely an unfair and inaccurate conclusion.

As petitioner observes, respondent invoked his statutory right under Michigan law to a polygraph examination, and that test may have been given on the same day as the offending interrogation.[6] On this record, respondent's expressed desire to take a polygraph examination may be inextricably intertwined with the custodial interrogation which followed or preceded it. It is therefore unclear whether respondent's desire to take a polygraph examination was confused with or transformed into a desire to give a statement. If respondent believed that he had to speak to the police in order to obtain his statutory right to a polygraph examination, then respondent was subjected to an intolerable choice which injects an element of coercion. *Garrity* v. *New Jersey*, 385 US 493 (1967). And the prosecutor's question, as well as the respondent's answer, conceivably were adroit attempts to avoid reference to the polygraph examination itself which, under Michigan law, may have injected reversible error.[7]

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[6] In Michigan, this procedure may implicate traditional concerns for voluntariness and trigger the necessity for "Walker hearings." (*People* v. *Walker*, 374 Mich 331; 132 NW2d 87 (1965), holding that the voluntariness of a confession must be determined on a separate record outside of the presence of the jury.) *See, e.g., People* v. *Sclafani*, 132 Mich App 268 (1984); 347 NW2d 30 (1984). *See also Henry* v. *Dees*, 658 F2d 406 (5th Cir 1981).

[7] *See, e.g., People* v. *Walker Frazier*, 24 Mich App 360; 180 NW2d 193 (1970); aff'd 385 Mich 596 (1971).

Respondent's counsel made no effort to inquire about or challenge the legality of the statement. The Michigan Court of Appeals concluded that this critical failure by appointed counsel may have been because "he apparently believed that the second statement was identical to Defendant's trial testimony."[8] In any event, the record below is almost completely barren of facts concerning the full extent of police conduct and demeanor involved in the taking of this statement. Nor does the record speak to respondent's mental condition, level of literacy, state of mind, level of intelligence or physical condition.[9]

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[8] In *People* v. *Sclafani*, *supra*, note 6, the Michigan Court of Appeals found that defense counsel's limited familiarity with police polygraph examinations, which in that case led to defendant's confession during a pre-polygraph "interview", amounted to ineffective assistance of counsel compelling a reversal. The ABA Special Committee on Criminal Justice in a Free Society, in its 1988 report "Criminal Justice in Crisis," discussed the Sixth Amendment right to counsel finding that:

> The right to representation by counsel for criminal defendants is constitutionally mandated and essential to the administration of criminal justice. The defense lawyer, performing in accordance with professional standards, provides a necessary challenge to the prosecution and notwithstanding popularly held belief, does not cause dysfunction in the criminal justice system. Prosecutors and police appreciate the role of the defense lawyer and do not believe that these lawyers impair their ability to control crime or to prosecute cases effectively. In the case of the indigent defendant, the problem is not that the defense representation is too aggressive but that it is often inadequate. Id at 35.

The personal services voucher submitted by counsel and contained in the trial record shows a single visit with respondent at the county jail on July 14, 1986. A preliminary examination scheduled for July 10, 1986 was also waived. Moreover, the statement itself was exculpatory in nature and one might reasonably suggest that perceived inconsistencies involved peripheral or unimportant details.

[9] Both the complainant in the case and the respondent had substance abuse problems and admitted use of cocaine.

Voluntariness and an absence of impermissible coercion are an absolutely essential predicate to resolution of the issue as framed by petitioner. And this Court may not wish to "engage in this type of abstract adjudicating of constitutional rights in a factual vacuum." *New Jersey* v. *Portash*, 440 US 450 at 464 (Blackmun, J., dissenting). Regardless, petitioner's effort to extend application of the impeachment exception to the Fourth Amendment exclusionary rule or the prophylactic requirements of *Miranda* to a substantive violation of the Sixth Amendment right to counsel should fail.

### B. THE IMPEACHMENT EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD HAVE NO APPLICATION TO THE DELIBERATE VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Petitioner argues that notwithstanding deliberate violation of the Sixth Amendment right to counsel, the state should be free to make affirmative use of a wrongfully obtained statement to cross-examine a defendant.[10] There is no question that this Court has long held that physical evidence illegally seized in contravention of Fourth Amendment rights may be used in such a manner. *Walder* v. *United States*, 347 US 62 (1954); *United States* v. *Havens*, 446 US 620, 626 (1980). But the harms involved in these distinct constitutional rights are as different as the rights they are intended to secure and the important purposes underlying them. In the normal course, an illegal search is likely in the investigative stage rather

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[10] The fact that contact with respondent may have been initiated because of respondent's request for a polygraph examination is irrelevant to the Sixth Amendment violation. *See Maine* v. *Moulton*, 474 US 159 (1985)

than after formal accusation. The harm is essentially complete at the time of the wrongdoing. The aggrieved party has other remedies. *See, e.g., Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971). A Sixth Amendment violation, on the other hand, necessarily occurs after the state initiates formal proceedings and impacts upon the integrity of the trial process. Thus it has been suggested that Fourth Amendment rights are substantive rights reposed in all citizens, unlike Sixth Amendment rights which are procedural and involve the integrity of a criminal prosecution. *See* Loewy, "Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence", 87 Mich. L. Rev. 907 (1989)

Formal charge by the state marks the commencement of adversarial judicial proceedings and is a constitutionally significant moment.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. *Kirby* v. *Illinois* 406 US 682, 689-90 (1972) (plurality opinion) (footnote omitted).

Critical Sixth Amendment rights are thus said to "attach" to the accused and limit subsequent interaction

between the state and the accused. This Court has therefore emphasized that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and, thereby, dilutes the protection afforded by the right to counsel." *Maine* v. *Moulton*, 474 US 159 (1985). The state is not permitted to deliberately elicit (or logically attempt to elicit) incriminating statements from a defendant represented by counsel after indictment or formal charge. *Massiah* v. *United States*, 377 US 201 (1964); *United States* v. *Henry*, 447 US 264 (1980). The right to counsel is one of several Sixth Amendment guarantees which are fundamental rights extended to the accused through the Fourteenth Amendment in a state prosecution. *Herring* v. *New York*, 422 US 853 (1975). *Massiah* binds the state through the Fourteenth Amendment. *McLeod* v. *Ohio*, 381 US 356 (1965).

When unnamed police officers interrogated respondent in secret more than two months after appointment of counsel and six days before his trial, they were not engaged in an investigative inquiry to solve a crime. Instead they served as agents of the prosecutor and were "adversaries" attempting to obtain admissions and prepare for trial. Thus, they deliberately attempted to substitute non-public interrogation for public trial with all of its procedural safeguards. The presence of counsel is absolutely necessary on such an occasion to "minimize the imbalance in the adversary system." *United States* v. *Ash*, 413 US 300, 309 (1973). An attorney's presence is necessary in this critical situation "where the accused is confronted by his expert adversary" under circumstances where "the results might well settle the accused's fate." *Id.* at 310.

Also, deliberate intrusion of respondent's right to counsel here causes a continuing harm which extends to the

trial process itself. Under the facts of this case, questions of fairness, reliability, and trustworthiness are implicated. The attempt by the trial prosecutor to impeach respondent by an alleged omission at the time of the interrogation is illustrative:

> Q. You didn't tell the investigator last week that he had bought his own cocaine, did you?
>
> A. Did I tell the investigator last week? Yes, I told him?
>
> Q. You did?
>
> A. Yes.
>
> Q. So, if it's not in the statement, they just left it out?
>
> A. Yes.
>
> R 121, 122

Here, respondent testified that he made a particular statement to the interrogating officers, while the prosecutor insinuates to the contrary. This, according to the petitioner, is a desired truth-testing device. Incongruously, however, the prosecutor in this case failed to complete the impeachment process since the officers who conducted the interrogation were never called as witnesses. But the point here is not that respondent's answer stands uncontradicted in the trial record; rather the point is that presence of counsel was necessary at the interrogation, not only to advise respondent on whether to make a statement, but also to "serve several significant subsidiary functions as well". These include mitigating "the dangers of untrustworthiness" and helping "to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." *Miranda* v. *Arizona*, *supra* at

469-470. Thus, the role of counsel at post-indictment interrogation need not be relatively limited, unimportant, or unidimensional.[11]

Indeed, the subtleties of post-indictment, secret interrogation, by a law-enforcement adversary preparing for trial may be far greater than the subtleties involved in jury voir dire or other trial events. During post-indictment questioning, it is of paramount importance that questions and answers be unambiguous, comprehended, fairly stated, and responsive, as well as accurate and "rightly reported" to the prosecutor. Further, reality and experience teach us that law enforcement officers and civilians, including those accused of crimes, often do not speak the same language. *See, e.g., United States* v. *Marshall*, 488 F2d 1169, 1171 fn. 1 (9th Cir 1973) (agents often speak an almost "impenetrable jargon".) It is the *presence* of counsel at post-indictment interrogation which may prevent distortion of the truth-seeking function.[12]

Nor is it appropriate to suggest that there need be no concern for the concept of deterrence. In a close case, such as this one, a police officer may be sorely tempted to engage in pretrial interrogation in an effort to prepare for trial, buttress the state's case, learn defense strategy, or even dissuade a defendant from exercising his right to

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[11] *Cf. Patterson* v. *Illinois*, 108 S Ct 2389 (1988) fn 6,13

[12] When the Solicitor General urges that Sixth Amendment violations should not handicap the "advocates" in their ability to expose truth, the government realistically speaks of the police/agent "advocate" who takes the place of the professional prosecutor. Brief for the United States at 18. Indeed, many federal law enforcement agents are college educated or trained as lawyers. When a police officer or federal agent departs from the role of an investigator and becomes an advocate preparing for trial, serious concerns may arise concerning trustworthiness and accuracy.

testify. An officer could thereby consciously or unconsciously hinder accurate fact finding. The deliberate intrusion into the attorney-client relationship may undermine the relationship itself and detract from counsel's ability to fairly and fully present a defense.[13]

Sixth Amendment violations are thus imcomparable to Fourth Amendment harms. The precious Sixth Amendment right to counsel has long been cherished by this Court because it "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'". *Johnson* v. *Zerbst*, 304 US 458, 462 (1937). As the late Chief Justice G. Mennen Williams of the Michigan Supreme Court wrote in *People* v. *Gonyea* 421 Mich 462, 477, 365 N W 2d 136 (1984):

> In light of the particular importance of the right to counsel, we are hesitant to tolerate any transgression. To permit law enforcement officers to obtain statements from the defendant in violation of his right to counsel, and to use those statements to attack the defendant and his case, would be to permit an attack on the very foundation of our criminal justice system. When the police are permitted to commit such a violation, the effect is to gnaw at the very pillars of democracy.

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[13] *Cf. United States* v. *Shuck*, 44 Cr. L Rep. 2393 (DC N WVa) where the district judge found that government attorneys engaged in efforts to impair the relationship between defendants and their lawyers. *See also United States* v. *Morrison*, 449 US 361 (1981), where agents denigrated defense counsel, attempted to convince the defendant to relinquish her trial rights, strike a bargain with the government and "cooperate".

### C. THE IMPEACHMENT EXCEPTION TO THE *MIRANDA* PROPHYLACTIC RULE, ESTABLISHED IN *HARRIS* V. *NEW YORK*, SHOULD HAVE NO APPLICATION TO THE DELIBERATE VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

In *Miranda* v. *Arizona*, this Court utilized a prospective warning to improve the criminal justice system. By establishing and requiring a system of procedural safeguards, the Court sought to ameliorate the inherently coercive nature of custodial interrogation. Both the police and prosecution were placed on notice that adherence to these procedural rules was a necessary predicate for the admissibility of statements obtained from criminal suspects.[14] These prophylactic warnings, however, are "not themselves rights protected by the Constitution . . ." *Michigan* v. *Tucker*, 417 US 433, 444 (1974). Consequently, where police fail to adhere to the rules of *Miranda*, "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris* v. *New York*, 401 US 222, 225 (1970). Where there is a *Miranda* defective statement by the defendant, it may be used for impeachment purposes so long as it is trustworthy, voluntary, and uncoerced. This is so because of the importance of the criminal trial's function as a search for the truth and the need not to transform the prophylactic *Miranda* warnings into a license for perjury. *Harris*, 401 US at 226. *See also Oregon* v. *Hass*, 420 US 714 (1975).

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[14] Petitioner also offers an elaborate footnote (footnote 6, pages 69 through 72) critical of *Miranda* and *Edwards*. But see "Criminal Justice In Crisis", American Bar Association, Special Committee on Criminal Justice in a Free Society at 27-34, which concludes that Miranda does *not* have a significant impact on law enforcement's ability to solve crime or achieve successful prosecutions.

Where a defendant's statement lacks voluntariness or involves a direct violation of the Fifth Amendment itself, then that statement may not be used for any purpose including impeachment. *Mincey* v. *Arizona*, 437 US 385 (1978); *New Jersey* v. *Portash*, 440 US 450 (1979). When the amendment itself is implicated, this Court found that balancing of those interests of deterrence and the truth seeking function was simply "impermissible". *Portash*, 440 US at 459.

The impermissibility of balancing, however, is not limited to violations of the Fifth Amendment alone. In a Sixth Amendment context, the Court also refuses to engage in balancing. Thus, the Court in *Brooks* v. *Tennessee*, 406 US 605 (1971), invalidated a "truth in testimony law" which required a criminal defendant to testify before any other defense witness.[15] The purpose of that statutory requirement was entirely consistent with the aim of promoting the truth seeking function of trial. But the law was invalid not only because it imposed an inappropriate restriction on a defendant's Fifth Amendment decision to testify or remain silent, but also because it denied defendant "the guiding hand of counsel at every step in the proceedings against him". *Brooks*, 406 US at 612 (quoting *Powell* v. *Alabama*, 287 US 45, 69 (1932)).

The Court has reached analogous results even when there were significantly less serious restrictions, despite assertions that the truth seeking function of trial might suffer. In *Geders* v. *United States*, 425 US 80 (1976), the Court determined that the trial court reversibly erred in forbidding consultation between defendant and counsel in an overnight recess during defendant's trial testimony.[16]

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[15] See Brief for Respondent State of Tennessee No. 71-5313 at 6.

[16] A similar restriction in a mere 15-minute recess during a defendant's testimony falls on the other side of the constitutional line. *Perry* v. *Leeke*, 102 L Ed2d 624 (1989).

It is evident that where core values of Fifth or Sixth Amendment rights are involved, the interests of preserving those values must be served aside from contentions that the truth seeking function may be impaired.

Petitioner's restrictive view of the role of counsel is contradicted by this Court's long standing body of Sixth Amendment jurisprudence. On this record there is no support for any implied invitation by petitioner to redefine the parameters of the Sixth Amendment.

The right to counsel concerns fairness not just at the trial itself, but at every critical stage preceding it. *See, e.g., Coleman* v. *Alabama*, 399 US 1 (1970) (remanded for determination whether a lack of counsel at pre-indictment preliminary hearing prejudiced defendants at trial); *Hamilton* v. *Alabama*, 368 US 52, 54 (1961) (absence of counsel at post-indictment arraignment "may affect the whole trial"); *Massiah* v. *United States*, *supra* (post-indictment conversation with government informant monitored by police); *United States* v. *Wade*, 388 US 218 (1967) (post-indictment lineup).

Admittedly, before the decision to prosecute, the state has a strong interest in conducting interrogations. After initiation of formal charges, however, the state should have no legitimate need to engage in private inquisition to further prepare its case for trial. Where police feel constrained to engage in post-indictment, counselless questioning as advocates or adversaries, there likely are enhanced possibilities for gamesmanship, deception, and ultimately untrustworthiness. This unacceptable result is more likely if the Sixth Amendment is depreciated and the right to counsel is deemed comparable to the prophylactic warnings required by *Miranda*. Where the state deliberately violates the right to counsel, the need to preserve the right itself should render balancing impermissible.

Respondent commends a reading of *Michigan* v. *Jackson*, 475 US 625 (1986) as an application of these principles rather than as a formulation of a prophylactic rule akin to *Miranda* warnings or the "protective umbrella" of *Edwards*. *Solem* v. *Sturnes*, 465 US 638, 644, n. 4 (1984). To respondent this is so because the adversarial process in *Jackson* had commenced and the post arraignment interrogations there implicated the constitutional guarantee itself. To deprive a defendant of this substantive constitutional right in this setting "may be more damaging than denial of counsel during the trial itself." *Maine* v. *Moulton*, 474 US at 170 (1985). Or, as stated in *Michigan* v. *Jackson*, 475 US at 632, "after a formal accusation has been made . . . the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation."

Even assuming arguendo that *Michigan* v. *Jackson* only establishes a prophylactic rule (a violation of which petitioner admits), the record in this case reflects a constitutional deprivation of Tyris Harvey's right to counsel, not only a breach of that prophylactic rule. Willful, deliberate disregard for respondent's right to counsel and the affirmative misrepresentation that counsel was unnecessary constitute a Sixth Amendment violation. It was a violation which penetrates the core value of that constitutional guarantee and therefore strikes at the integrity of the trial process itself. It cannot be suggested that respondent is not entitled to judicial relief. *United States* v. *Morrison*, 449 US 361 (1981).

Nor should the onus be placed on respondent to obviate or mitigate the harm by forfeiting his right to testify.[17] To

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[17] A defendant has a due process right to testify at trial. *Brooks* v.

suggest that deliberate misconduct by the state need not be deterred, as the Solicitor General contends, is to condone it and encourage it as well.[18] The state's disrespect for the right to counsel here raises serious concern. If the state is permitted to engage in such conduct or benefit from it, then the integrity and reliability of the trial process is impaired. In *Portash*, *supra*, the defendant's presumably truthful and reliable grand jury testimony could not be used for impeachment purposes without doing violence to the Fifth Amendment just as respondent's statement six days before trial cannot be used without eviscerating his Sixth Amendment right. *See Meadows* v. *Kuhlmann*, 812 F2d 72 (2d Cir), *cert denied*, 482 US 915 (1987); *United States* v. *Brown*, 699 F2d 585 (2d Cir. 1983). *See also People* v. *Gonyea*, 421 Mich 462, 365 NW2d 136 (1984). Various commentators concur in the submission that statements obtained in contravention of the Sixth Amendment should not be permitted for impeachment purposes. *See* Comment, "The Impeachment Exception to the Sixth Amendment Exclusionary Rule", 87 Col. L. Rev. 176 (1987); Comment, "Application of the Impeachment Exception to the Sixth Amendment Exclusionary Rule: Seeking a Resolution Based on the Substance of the Right to Counsel", 50 Albany L. Rev. 343 (1986).

Incredibly, petitioner here apparently seeks blanket authority for the police to interrogate defendants at any

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*Tennessee*, 406 US 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.") It violates due process for a defendant to be forced to sacrifice one constitutional right to enforce another. *Simmons* v. *United States*, 390 US 377, 393-4 (1968).

[18] *Cf. Moran* v. *Burbine*, 475 US 412 (1986). *See* Pitofsky, "A Missed Opportunity to Curb Police Deception of Criminal Defense Attorneys", 25 American Cr. L. Rev. 89 (1987).

time after they have been accused and without any notice to their counsel. The logical import of petitioner's contention is that the police should be free to conduct such interrogations whenever and as often as they like, even during the trial itself. Of course, those most likely to have their Sixth Amendment rights violated are those defendants already in the custody of the state, especially indigent persons like respondent Harvey. And license to engage in such activity can only result in substantial numbers of pre-trial or mid-trial evidentiary hearings, which will be disruptive, as well as impair the role of counsel that is so "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 US 668, 685 (1984).

Moreover, in this instance, the police are the "alter ego" of the prosecutor. Neither the courts nor the legal profession would condone the conduct here in the context of civil litigation. In *United States* v. *Springer*, 460 F2d 1344, 1354 (7th Cir. 1972), then Circuit Judge Stevens in dissent observed:

> "The work of the agents was trial preparation, pure and simple. In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from procedural regularity as to violate the due process clause of the Fifth Amendment. 460 F2d at 1355.

*See also United States* v. *Hammad*, 846 F2d 854 (2d Cir. 1988) (government argued alternatively that DR7-104(A)(1) becomes operative after Sixth Amendment rights have attached); *United States* v. *Thomas*, 474 F2d 110 (10th Cir.), *cert. denied* 412 US 932 (1973).

In short, the adversary process cannot function properly if the state is left free to circumvent or defile the right to counsel at whim. Permitting the state to impeach a

defendant with a statement taken in violation of the Sixth Amendment would destroy the constitutional guarantee "essential to any fair trial of a case against a prisoner" (*Powell* v. *Alabama*, 287 US at 70). The right to counsel would become meaningless.[19]

## CONCLUSION

For the reasons stated herein, the judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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[19] The question of a valid waiver is not before the Court, yet the Solicitor General argues that respondent waived his right to counsel. Brief For The United States fn 8 at 23. As indicated earlier, the trial prosecutor admitted that the statement was *Miranda* defective. The showing necessary for a waiver of counsel has been equated to that necessary to demonstrate a waiver of the right to trial by jury. *Boykin* v. *Alabama*, 395 US 238 (1969). A valid waiver is not shown unless it is demonstrated that there is an understanding and intelligent relinquishment of a known right. *Tague* v. *Louisiana*, 444 US 469 (1980). The prosecutor's burden to demonstrate a waiver is not only a heavy one, but courts indulge in every reasonable presumption against finding one. *North Carolina* v. *Butler*, 441 US 369 (1979). *See also Carnley* v. *Cochran*, 369 US 506 (1962)